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In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FOREST AND PAPER ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FOREST AND PAPER ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The American Forest and Paper Association (AF&PA) is the national trade association of the forest, paper, and wood-products industry. AF&PA represents more than 200 companies and related associations that engage in or represent the manufacture of pulp, paper, paperboard, and wood products. The forest-products industry accounts for approximately seven percent of total U.S. manufacturing output, employs 1.1 million people, and ranks among the top ten manufacturing employers in 42 States. AF&PA member companies represent approximately 84% of the domestic paper, paperboard, and market pulp production capacity, and account for more than half of the solid-wood manufacturing capacity. They own a significant

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

portion of the nation's commercial forests and annually plant nearly half of all tree seedlings in the United States.

In this case, the Ninth Circuit affirmed a $78 million antitrust judgment against petitioner Weyerhaeuser Company based on a claim of "predatory bidding." In doing so, the court displayed a fundamental misunderstanding of the forms legitimate competition may take in a market economy – particularly in the context of an inelastic supply market. Moreover, the Ninth Circuit applied a liability standard that fails to provide any objective basis to distinguish a manufacturer's legitimate and desirable competition to acquire raw materials from buying behavior that is truly predatory and anticompetitive. As a result, juries will mistakenly award treble damages against defendants that did not actually engage in predatory conduct, and countless additional firms will simply refrain from vigorous competition in order to avoid the risk of such liability. The effects of the Ninth Circuit's decision are far reaching. Manufacturers, suppliers of raw materials, and consumers of manufactured products will suffer ill effects if the Ninth Circuit's standard is affirmed.

The *amici* are well situated to explain the practical effects that the Ninth Circuit's decision will have on these disparate groups. AF&PA members include businesses that are substantial producers of forest products that are used as inputs to produce wood and paper products, as well as businesses that buy such inputs to produce wood and paper products. The Chamber's membership, likewise, includes many businesses that produce raw materials and other inputs used by manufacturers, as well as manufacturers that purchase such inputs. The Chamber's membership also includes businesses that purchase billions of dollars of manufactured products of all kinds. The Ninth Circuit's decision, by deterring vigorous competition among manufacturers to acquire raw materials, will adversely affect all of these groups, for the reasons explained below.

STATEMENT

Weyerhaeuser owns and operates six hardwood sawmills in the Pacific Northwest. It purchases alder timber from timberland owners and loggers and uses those sawlogs to produce finished alder lumber. From 1998 to 2001, alder sawlog prices increased, while the price of finished alder lumber decreased. Weyerhaeuser's profits declined, but it continued to operate profitably. Ross-Simmons Hardwood Lumber Company, one of Weyerhaeuser's competitors, lost money during this period and shut down in 2001. It sued Weyerhaeuser, claiming that Weyerhaeuser violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in predatory "overbidding" and "overbuying" of alder sawlogs in order to eliminate Ross-Simmons and others as competitors in the market for the purchase of sawlogs. The case was tried to a jury, which found for Ross-Simmons on this claim[2] and awarded damages of $26 million (automatically trebled to $78 million). Pet. App. 2a-4a; Pet. 3-5.

The Ninth Circuit affirmed. It observed that Section 2 of the Sherman Act prohibits monopolization of markets for the purchase of products, as well as of markets for the sale of products. Pet. App. 6a. It described Ross-Simmons's claim as one in which "the price level itself is the anticompetitive weapon." *Id.* at 8a. It recognized that, "[i]n the long run, to carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials" during the period of the so-called overbidding. *Id.* at 10a. "[T]he recoupment phase of a predatory bidding scheme mirrors the recoupment phase of a predatory pricing scheme." *Id.* at 11a n.19.

The court of appeals held, nonetheless, that the plaintiffs did not need to prove the prerequisites for predatory pricing liability established by *Brooke Group Ltd.* v. *Brown &*

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[2] The jury returned a verdict for Weyerhaeuser on a separate claim that it had monopolized the market for the sale of finished alder lumber. See Pet. 4 n.2.

Williamson Tobacco Corp., 509 U.S. 209 (1993). There was no "need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." Pet. App. 13a. "*Brooke Group* does not control in the buy-side predatory bidding context." *Id.* at 5a. The jury was properly instructed, according to the court of appeals, when it was told that it could be an anticompetitive act if Weyerhaeuser "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price." *Id.* at 14a n.30.

SUMMARY OF ARGUMENT

By endorsing a liability standard that asks simply whether input prices were "fair" to competitors, the Ninth Circuit revealed its fundamental misunderstanding about the nature of competition. The court of appeals' analysis tacitly assumed that (1) antitrust law requires "fair" prices, rather than prices resulting from free competition among buyers and sellers; and (2) firms should not engage in vigorous competition over the price of scarce inputs. Both of those assumptions are wrong. In a market economy, price is determined by supply and demand, not by normative concepts such as fairness. Moreover, the notion that firms should decline to compete vigorously to acquire inputs ignores the practical reality that firms often *must* compete on this and many other aspects of production. That is particularly true where, as the court of appeals believed to be the case here, firms are vying for a limited, inelastic supply of inputs. Inelasticity makes it likely that entirely legitimate competition to acquire scarce inputs will drive up prices, because the only sure way to secure additional inputs is to bid up the price. Indeed, the price movements here – rising input costs and falling output prices – are entirely consistent with legitimate buy-side and sell-side price competition.

The Ninth Circuit's flawed understanding of the nature of competition is compounded by its misguided concept of market

power. The court should have asked whether Weyerhaeuser had the ability to cause the relevant antitrust injury – *i.e.*, a *sustained reduction* in the prices it must pay for inputs. Only firms with very large market shares in markets with high barriers to entry have that capacity. Instead, the court asked whether Weyerhaeuser was able to cause a *short-term increase* in the price it and its competitors paid for inputs. Firms with much smaller market shares have the ability to do that. Because such firms would be incorrectly deemed to have market power under the Ninth Circuit's approach, those firms will face treble-damages awards even though they are utterly incapable of successfully executing a predatory buying scheme.

No less troubling, the Ninth Circuit's standard would defy practical application. Asking whether one firm's buying behavior was "fair" to a competitor affords no meaningful guidance and invites juries to conflate vigorous competition and predatory conduct. The very real possibility of such false positives casts a long shadow. Firms will be unable to predict whether an input price level is "fair," because that assessment often will require information about competitors that a firm typically does not possess. The resulting uncertainty will no doubt deter firms from engaging in vigorous competition, particularly because the vague "fairness" standard will protect even dubious claims from dismissal before trial. Perversely, the court of appeals' standard might even tempt some firms to share input pricing data with each other in hopes discerning a "fair price," which might itself constitute anticompetitive behavior.

Applying the *Brooke Group* standard to buy-side predation claims, by contrast, would give firms clear signposts for avoiding liability while adequately addressing conduct that is actually likely to be predatory. Whether the alleged predator operated at a loss and, if so, whether there was a "dangerous probability" that those losses could be recouped are questions that judges and juries can answer by looking at objective evidence. Use of that standard therefore reduces the likelihood that juries would mistake competition for predation. The *Brooke Group* standard also turns on information that is readily

available to firms (for example, their own costs and revenues), allowing them to engage in vigorous, legitimate competition without fear that a disadvantaged rival may later cry foul.

The court of appeals rejected the *Brooke Group* standard for predatory bidding because of its belief that buying competition produces fewer benefits than selling competition. That view grossly underestimates the value of buying competition. An antitrust liability standard that discourages such competition harms sellers and reduces their incentives to expand output of their products. It also harms competition among buyers, because a buyer that purchases a smaller quantity of raw materials (which is what Weyerhaeuser should have done, according to the plaintiff and the court of appeals) will necessarily reduce its output of finished products. The result will be to reduce the total output of finished products, or to shift production of those products from more efficient to less efficient manufacturers, both of which are inconsistent with the objectives of the antitrust laws. The consumers of finished products will also suffer, because output of finished products will decline or will be more costly, and because output of raw materials will eventually be suppressed by the reduction of buying competition.

ARGUMENT

Section 2 of the Sherman Act polices the line between promoting vigorous competition and prohibiting genuinely anticompetitive conduct. To that end, the law recognizes that the "drive to succeed lies at the core of a rivalrous economy. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition." *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.). This case concerns the application of that principle to a rare species of antitrust claim based on allegations that the defendant has engaged in "predatory" behavior toward rivals by paying too much for raw materials (buy-

side predation) or by charging customers too little for finished goods (sell-side predation).

Predatory schemes are simple in theory. Sell-side predation seeks to eliminate competitors by selling finished goods at prices so low that other firms are forced to close their doors. Once the competition has been extinguished, the theory goes, the predatory firm can try to recoup its losses by charging consumers monopoly prices. Buy-side predation works the same way, but it focuses (initially) on raising the price a firm must pay for inputs. A buy-side predator tries to drive out competitors by purchasing raw materials at such high prices that competitors can no longer afford to buy the inputs they need to produce finished goods. If competitors for inputs indeed disappear, then the predatory firm will have acquired monopsony power[3] in the market for inputs and can recoup its losses by artificially depressing the prices it must pay suppliers.

In reality, predation is "'rarely tried, and even more rarely successful.'" *Brooke Group*, 509 U.S. at 226 (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)). That is hardly surprising, because predatory conduct ultimately requires a firm to divert profits to its customers (sell-side) or to its suppliers (buy-side) in hopes of driving competitors out of the market. Such a strategy does not come cheap. The predator must throw enough money away to force its rivals actually to cease operations – it is not enough just to hold down competitors' profits or even to cause them to have a few bad years. And, even if a predator is successful in eliminating the competition, it cannot recoup its massive investment unless the market *stays* sufficiently concentrated to allow significantly supracompetitive profits. If new competitors enter the market, a predator will lose the ability to recoup through monopoly or monopsony pricing. Likewise, in the sell-

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[3] "Monopsony is the term used to describe a situation in which the relevant market for a factor of production is dominated by a single purchaser." *Permian Basin Area Rate Cases*, 390 U.S. 747, 794 n.64 (1968).

side context, consumers may simply elect to substitute other finished goods rather than pay monopoly prices; in the buy-side context, suppliers may divert their resources to other uses instead of accepting the predator's monopsony prices.

In *Brooke Group*, this Court addressed the legal standard governing claims of sell-side predation, holding that plaintiffs must satisfy two prerequisites. First, a plaintiff must prove that the defendant's low prices were unprofitable in the short term – *i.e.*, that "the prices complained of are below an appropriate measure of [defendant's] costs." 509 U.S. at 222. Second, a plaintiff must show at least a "dangerous probability" that the defendant would recover its short-term losses (from charging below-cost prices) by charging monopoly prices in the long run, after its rivals had been driven from the market. *Id.* at 224. The Court required such proof because the mechanism by which a seller engages in predatory pricing – lowering prices – is the same mechanism by which a seller stimulates competition. Without those two prerequisites for liability, there would be too great a risk that a jury would mistakenly infer predation from conduct that was, in fact, lawful and procompetitive. "It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high." *Id.* at 226-227. See also *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnation 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting *Matsushita*, 475 U.S. at 594).

This case concerns the standard applicable to buy-side predation. The Ninth Circuit concluded that *Brooke Group* does not apply to predatory buying claims. Accordingly, it held that the plaintiff did not have to prove that Weyerhaeuser suffered short-term losses because of its "predatory bidding" for timber, or that there was a dangerous probability that Weyerhaeuser would recover the short-term costs of its alleged buying strategy by paying less-than-competitive prices in the long term. The Ninth Circuit, instead, endorsed a jury instruc-

tion that permitted liability if the jury found that Weyerhaeuser "purchased more logs than it *needed* or paid a higher price for logs than *necessary*, in order to prevent the Plaintiffs from obtaining the logs they needed at a *fair price*." Pet. App. 14a n.30 (emphasis added).

The Ninth Circuit was wrong to impose a metaphysical "fairness" test in place of the clear, objective standards supplied by *Brooke Group*. The court of appeals' conclusion is premised on a fundamental misunderstanding of free-market competition, and it ignores the fact that "'the antitrust laws were passed for the protection of *competition*, not *competitors*.'" *Brooke Group*, 509 U.S. at 224 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). As a practical matter, the Ninth Circuit's standard will have profoundly harmful effects in numerous markets and industries. Searching in vain for a clear definition of what constitutes a "fair" price for inputs, juries inevitably will mistake legitimate, hard-nosed competition for predatory behavior. Consequently, firms hoping to avoid potentially massive treble-damages awards will have little choice but to refrain from vigorous competition for inputs, artificially depressing the price of raw materials and restricting the output of finished goods. All of this will result in substantial harm to suppliers of raw materials, manufacturers, and consumers of finished goods.

I. The Ninth Circuit Wrongly Equated "Fairness" With Lawful Competition And Misunderstood The Proper Measure Of Market Power In A Predatory Buying Analysis

1. The Ninth Circuit's error in rejecting the *Brooke Group* standard for buy-side predation claims began with its fundamental misunderstanding of what constitutes legitimate competition among manufacturers. In the Ninth Circuit's view, a firm engages in anticompetitive behavior when it pays "a higher price * * * than *necessary*" for inputs, such that a competitor is unable to obtain the inputs it desires "at a *fair* price." Pet. App. 7a n.8 (emphasis added). But "necessity" and

"fairness" are not synonymous with lawful competition. To the contrary, vigorous yet lawful competition may leave an inferior firm feeling the sting of a competitor's advantages in any number of dimensions, including the price the competitor is willing and able to pay for raw materials. Such competition may be perceived as "unfair," but this perceived "unfairness" is not inconsistent with legitimate competition; it often is a natural and expected consequence of it. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 111d, at 103 (2d ed. 2000) ("[R]ivals may think * * * competition from a more efficient firm to be unfair, especially when the latter firm is larger than the complainant and particularly when the larger firm has lower costs. * * * [T]his conception of fairness is, of course, antithetical to both competition and economic efficiency.").

In wrongly equating "fairness" with lawful competition, the Ninth Circuit relied on two unstated, false assumptions about a market economy. The first is that there exists a "fair" price for goods that differs – in a way that matters under the antitrust laws – from the price that results from the free interplay between buyers choosing the prices they will offer and sellers choosing the prices at which they will sell. Market participants will often wish that those prices were higher or lower, and they may believe it is "unfair" that they are not. But the antitrust laws are based on "[t]he assumption that competition is the best method of allocating resources in a free market * * *. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). The antitrust laws "do not create a federal law of unfair competition." *Brooke Group*, 509 U.S. at 225.

The Ninth Circuit's reasoning could easily be extended to numerous other facets of competition, but the search for "fairness" would prove just as futile. For example, in a tight labor market, is it "fair" for one firm to offer higher wages or better benefits than its competitors can afford, in order to ensure

access to a limited supply of skilled workers? Or is it "fair" if one chain of coffee shops is consistently willing and able to pay top dollar for prime locations, such that competitors are forced to occupy less profitable storefronts? Carried to its logical conclusion, the Ninth Circuit's fairness test threatens to impose Section 2 liability whenever a firm pays "too much" for virtually any aspect of production. As these examples illustrate, however, fairness is a perpetually elusive concept in an unregulated market economy.

The Ninth Circuit's second false assumption – which is a corollary of its first – is that the price of inputs generally is not a ground on which firms should engage in vigorous competition. In reality, however, the price a firm is willing and able to pay to secure raw materials is a key facet of competition in many markets. A manufacturer may quite reasonably pay more for inputs to guarantee timely delivery, consistent quality, or quantities sufficient to meet output goals. If a firm can afford to pay more than a competitor to secure those advantages, we should expect it to do so. To discourage such behavior is to discourage competition.

That is particularly true where "[t]he nature of the input supply at issue * * * does not readily allow for market expansion." Pet. App. 11a. The Ninth Circuit asserted that "alder sawlogs are a 'natural resource of limited annual supply in a relatively inelastic market'" and concluded that inelasticity counseled in favor of a lower standard for buy-side predation claims, because new market entrants are not likely to emerge to supply disadvantaged competitors. *Ibid.* (quoting Richard O. Zerbe, Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717, 722 (2005)). Even if the Ninth Circuit was right that the alder sawlog supply is inelastic,[4] however, its analysis is incomplete. It overlooks the fact that, if the supply of raw materials is inelastic, vigorous

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[4] Whether the alder sawlog supply is, in fact, inelastic appears to be a matter of some dispute. See Br. Campbell Group *et al.* 12-13 & nn.4-5 (filed Oct. 26, 2005).

competition among buyers (for entirely legitimate reasons) will necessarily drive prices up. That is because, if the overall input supply is limited and not responsive to incremental price increases, firms wanting to buy more inputs and thereby increasing overall demand typically must pay more to get them.

A simple example illustrates why that is so. Assume that three competing sawmills each process 100,000 alder sawlogs annually, fully consuming the 300,000 sawlogs that come to market each year. One sawmill develops a more efficient production process that allows a 20% increase in output without significantly raising production costs, so the firm plans to buy 120,000 sawlogs that year. There is now a demand for 320,000 alder sawlogs. If supply is relatively elastic, the increase in demand would spark additional production – *i.e.*, landowners would grow and cut more trees to fill the extra orders. But if supply is relatively *inelastic*, an immediate increase in production is unlikely to occur, and demand will exceed supply. The sawmill with increased production capacity therefore must outbid its competitors to get the extra 20,000 sawlogs. Because that sawmill can increase production without increasing operating costs, it can afford to do just that. Thus, contrary to the Ninth Circuit's supposition, the inelasticity of the alder sawlog supply just as easily supports the likelihood of legitimate price competition as it does the theoretical possibility of monopsonistic recoupment.

Moreover, price competition for inputs in an inelastic supply market is consistent with vigorous price competition in the sale of finished goods. Returning to our hypothetical sawmills, suppose that one elects to pursue a business strategy of selling finished lumber at a lower profit margin but in higher quantities than its competitors. Further suppose that a 5% decrease in price results in a 10% increase in sales, such that the sawmill must now process 110,000 sawlogs each year in order to fill customers' orders. Those extra logs must come from somewhere. If the supply is relatively inelastic, the only sure way to procure them is to offer a higher price to suppliers. Competitors might perceive the increase in input prices as an

attempt to "prevent [them] from obtaining the logs they needed at a fair price," Pet. App. 11a n.8, when, in fact, it is merely the result of classic sell-side price competition.

Indeed, lower prices on the sell side typically will result in increased demand for the product, exerting further upward pressure on the price of an inelastic input. Even if a competing sawmill needs fewer sawlogs because it is losing some customers to a rival selling lumber at lower prices, the overall demand for lumber (and, concomitantly, for sawlogs) will increase as lumber prices fall – more people will buy lumber if it is less expensive. That effect is even more acute where, as here, the finished goods are fungible with goods produced from other inputs. In such a market, a manufacturer lowering sell-side prices will not only expand overall demand for a particular finished good, but also lure additional customers away from manufacturers that process substitute inputs. For example, finished alder lumber competes directly with lumber manufactured from other hardwood species, such that Weyerhaeuser processed about 65% of Pacific Northwest alder sawlogs, but its sell-side share of the North American hardwood lumber market was below 3%. Pet. App. 3a; C.A. E.R. 405. As a result, in our hypothetical example, the sawmill that elects to lower finished lumber prices in hopes of increasing sales is likely to draw customers away *both* from competing alder sawmills *and* from sawmills that process other species of hardwoods. Thus, even a modest decrease in the price of finished alder lumber may result in a dramatic increase in the demand for (and price of) alder sawlogs.

It should come as no surprise, then, that the relevant price movements observed here are consistent with legitimate buy-side and sell-side competition. As the Ninth Circuit noted, "the price of finished lumber decreased while the cost of sawlogs increased during the alleged predation period." Pet. App. 10a n.15. While we do not challenge the Ninth Circuit's conclusion that "[i]t is not clear from the record whether lumber prices decreased because of a decision Weyerhaeuser made, or for other reasons," *ibid.*, the point remains that the price

movements of sawlogs and finished lumber during the alleged predation period are the predictable consequence of legitimate competition in this market.

2. In any event, rising input prices tell only half of the story, because the ultimate success of a predatory buying scheme depends on a firm's ability to lower input prices below competitive levels for a sustained period.[5] Although the court of appeals correctly noted that successful buy-side predation would require a firm "to recoup the higher costs it had paid for its materials," Pet. App. 10a, it is clear from the court's assessment of Weyerhaeuser's market power that it fundamentally misunderstood how to go about evaluating whether a firm possesses that capability. The court of appeals recognized that a plaintiff alleging monopolization (whether of a buy-side or a sell-side market) must prove market power, either by showing that the defendant has a dominant share of a market with significant barriers to entry, or by direct evidence that the defendant has exercised market power. Pet. App. 20a-22a. The relevant question in a buy-side predation case, however, is not (as the Ninth Circuit apparently concluded) whether a firm has market power to *raise* the price of inputs; rather, the question is whether a firm has market power sufficient to *lower* the price of inputs below competitive levels for a sustained period.

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[5] It is helpful here to recall the differences between buy-side and sell-side predation. A sell-side predator sells below cost in hopes of driving out competing sellers and then recouping its short-term losses by charging supracompetitive prices after its competitors have been eliminated. A buy-side predator, by contrast, pays artificially high prices for inputs in hopes of driving out competing buyers and then recovering its short-term losses by paying less-than-competitive prices after its competitors have been eliminated. In theory, a firm could engage in buy-side predation in hopes of securing sell-side monopoly power, but, as the jury correctly found, that was not the case here. Rather, because finished alder lumber competes with other kinds of finished lumber, Weyerhaeuser's 65% share of purchases in the alder sawlog input market coincided with less than a 3% share of sales in the finished lumber market.

In sell-side markets, market power is usually defined as a seller's "ability profitably to maintain prices *above* competitive levels for a significant period of time." U.S. Department of Justice & Federal Trade Commission, 1992 Horizontal Merger Guidelines (with 1997 revisions) § 0.1, http://www.ftc.gov/bc/docs/horizmer.htm (emphasis added). In a market with substantial entry barriers, a large market share – say, 65% – is required to support an inference of market power. See Pet. App. 21a-22a. That requirement is based on the insight that, if a putative monopolist unilaterally attempts to raise prices above competitive levels, its effort will be unprofitable if the other firms in the market have a collective market share of more than 35%, because those other firms will have sufficient capacity to serve additional customers who turn to smaller suppliers to avoid the price increase. If the smaller firms can serve enough of those customers, even a very large firm's effort to increase prices will be unprofitable, and it will be forced to lower prices to competitive levels. A presumption that a firm must have a market share of 65% or more to *raise* selling prices, therefore, can also be expressed as a presumption that a firm with a market share of more than 35% can *lower* selling prices in the market.

For buy-side markets, the analysis is the same, except that market power is defined as the ability "to *depress* the price paid for a product to a level that is below the competitive price and thereby depress output." 1992 Horizontal Merger Guidelines, *supra*, § 0.1 (emphasis added).[6] Unless a firm occupies a truly

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[6] As this quotation suggests, the antitrust authorities understand – as do economists – that "[t]he core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act." *Chicago Prof. Sports Ltd. P'ship* v. *National Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) (Easterbrook, J.). The antitrust laws are concerned with buyer as well as seller power because either power can be used to reduce output. To translate its concern about paying excessive prices for alder sawlogs into a legitimate concern of the antitrust laws, however, the Ninth Circuit would have had to identify some way in which Weyerhaeuser's allegedly excessive payments could

dominant position in the market for inputs, any attempt to depress input prices artificially will be thwarted by other purchasers who can easily afford to pay competitive prices. And we can be confident that even a very large firm's ability to exercise monopsony power will not go untested, because sellers of inputs will eagerly seek out competing firms that are willing to pay more for inputs.

In this case, the court of appeals relied on so-called direct evidence that Weyerhaeuser had exercised market power (Pet. App. 21a), but its analysis was exactly backwards. It did not ask whether Weyerhaeuser had the power to *lower* the price of sawlogs below competitive levels and to maintain those low prices over a sustained period – the definition of monopsony; it asked whether Weyerhaeuser had "used its power to *raise* the price of sawlogs" in the short term. Pet. App. 21a (emphasis added). That was a fundamental mistake. While a buyer must have a very large share of the market to be able to force sellers to accept low prices (which sellers, of course, will try to avoid), a buyer with a much smaller share of the market will be able to cause a short-term price increase (which sellers will enthusiastically welcome). Market power, in other words, is not required to sacrifice profits in the short term by paying more than a competitive price for raw materials – almost any firm has that capability – it is required to earn supracompetitive profits in the long term by paying less than a competitive price for raw

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have led ultimately to a reduction in output – such as by eliminating a competitor, creating additional monopsony power during a "recoupment" period, leading to use of that power to pay low prices at which the sale of alder sawlogs would decline, and creating an artificial shortage in the supply of products made from alder sawlogs. But the Ninth Circuit eschewed any inquiry into whether such an output-reducing scenario was plausible on the record of this case, instead opting to describe the question in terms of "fair price[s]" and "necessary" prices and quantities and leave those determinations to a jury. Its opinion, like the opinion the Seventh Circuit reversed in *Chicago Prof. Sports*, "reads like the ruling of an agency exercising a power to regulate rates," *ibid.*, which is the antithesis of proper antitrust analysis.

materials on a sustained basis. The court of appeals' fundamental error in defining market power thus threatens to impose antitrust liability on firms that are utterly incapable of successfully executing a predatory buying scheme.[7]

II. The Ninth Circuit's Misguided Theory Will Inappropriately Punish And Grossly Overdeter Lawful, Desirable Competition

Even aside from its theoretical defects, the court of appeals' "fairness" standard defies practical application. It is hopelessly vague and invites errors by juries incapable of (or not interested in) distinguishing between vigorous competition and truly anticompetitive behavior. As a result, firms fearing mistaken treble-damages awards will decline to engage in the very competition that the antitrust laws are designed to foster. Perversely, the Ninth Circuit's standard may actually entice anticompetitive behavior: firms seeking certainty regarding whether their bids for inputs are "fair" to competitors may simply decide to ask competitors what they are offering, which is the first step in classic bid rigging. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 457-459 (1978). The *Brooke Group* standard, by contrast, was designed to avoid exactly those problems. It offers courts, juries, and firms clear signposts for identifying predatory conduct and thereby encourages vigorous competition on all fronts.

1. A standard based on "need" and "fairness" provides no meaningful guidance that would help juries distinguish between desirable competitive behavior and predatory behavior. See U.S. Br. 17 (filed May 26, 2006); Pet. 22-24. Unlike the *Brooke Group* test, which can be applied using objective

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[7] As we explain below (pp. 19-22, *infra*), the Ninth Circuit's rule would grossly overdeter legitimate competition, because firms will stop short of full-scale competition for inputs for fear of erroneous treble-damages awards. Because, under the Ninth Circuit's market power analysis, the risk of unjustified liability extends to any firm that has the power to raise prices in the short run, smaller buyers too will be deterred from vigorous competition to acquire scarce inputs for their manufacturing operations.

evidence, an amorphous concept such as "fairness" cannot be applied objectively and consistently. Even if one were to assume that "fairness" and competition are one and the same – which they are not – that simply begs the questions it purports to answer: What is "necessary"? How much is "too much"? As Members of this Court have recognized in other contexts, "[g]uidance like this is scarcely better than no guidance at all." *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring); see also *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 253 (1989) (Scalia, J., concurring in the judgment).

This case is a prime example of why "it [is] not enough to inquire 'whether the defendant has engaged in "unfair" or "predatory" tactics.'" *Brooke Group*, 509 U.S. at 225 (quoting *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993)). It is undisputed that, throughout the alleged predation period (1998-2001), petitioner Weyerhaeuser was an efficient and highly successful competitor in the Pacific Northwest alder sawmill market. See Pet. 3. It is also undisputed that Weyerhaeuser "sold all of the alder lumber it could produce," *ibid.*, and was consistently profitable, see *id.* at 5. Moreover, while "the cost of sawlogs increased" during the alleged predation period, Pet. App. 10a n.16, there is no evidence in the record that, after respondent closed its sawmill in 2001, the price of sawlogs fell below 1998 levels for a sustained period.[8] In fact, at the same time Weyerhaeuser was supposedly eliminating competition by artificially bidding up the price of alder sawlogs, four new hardwood sawmills entered the market and several more expanded operations. Pet. 3. All of this suggests either (1) that Weyerhaeuser was an efficient, profitable competitor in an increasingly competitive market; or (2) that it engaged in one of the most unlikely and ill-conceived predatory

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[8] To the contrary, publicly available data suggest that alder sawlog prices have continued to increase since 2001. See, *e.g.*, Oregon Department of Forestry Log Price Information, http://www.oregon.gov/ODF/STATE_FORESTS/TIMBER_SALES/logpage.shtml.

bidding schemes ever imagined. As the verdict in this case makes clear, the instruction approved by the Ninth Circuit gave the jury little help in assessing the relative probability of those alternatives; indeed, it did not even ask the jury to do so.

2. In the realm of antitrust, and especially in predation cases, "the costs of an erroneous finding of liability are high," *Brooke Group*, 509 U.S. at 226, not just for the unfortunate defendant forced to pay a treble-damages award, but also for the countless firms that are deterred from engaging in legitimate competition. Business executives must make very concrete decisions, and must make them in real time: How much should we buy? How much should we offer to pay? Operating in the shadow of potentially staggering damages awards, executives will have no choice but to refrain from aggressive competition in the many facets of production that could fall within the Ninth Circuit's buy-side "fairness" test.

a. Under the court of appeals' standard, a firm can do little more than guess where a jury might choose to draw the line between legitimate buy-side price competition and "unfair" predatory conduct. That is because a firm will be in no position to know – *ex ante*, at least – whether a particular price for inputs is "fair" to competitors. For example, a firm typically will not be aware of its competitors' profit margins, cash flow, or strategic business plans – all of which presumably would factor into a jury's assessment of whether one firm was unfairly putting the screws to another. Cf. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 398 (1927) ("[W]e should hesitate to adopt a construction [of the Sherman Act] making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable – a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.").

Returning to our three hypothetical sawmills, suppose all are concerned by the steady rise in alder sawlog prices coupled with the fall of the price of finished hardwood lumber. Saw-

mill *A* has determined that, once the price of alder sawlogs reaches a certain level, it would be more profitable to begin processing other hardwood species. Accordingly, it has instructed its buyers to bid for alder sawlogs only to a set point, and then to start buying maple. Sawmill *B*, however, believes that, because of improvements in operating efficiency, it can continue to be profitable by processing only alder sawlogs, even at higher prices. Sawmill *C* likewise wants to continue in the alder sawlog market, but it is strapped for cash and fears it cannot afford sawlogs if the price moves much higher. How should Sawmill *B* approach the next auction for alder sawlogs? Without being privy to the respective business positions of Sawmills *A* and *C*, Sawmill *B* would have no way of knowing whether submitting the highest bid would be deemed "unfair" or simply the result of "rival philosophies." *Trenton Potteries*, 273 U.S. at 398. Indeed, from Sawmill *B*'s perspective, the bidding strategies of Sawmills *A* and *C* would be indistinguishable: both would bid up to a certain point but no higher. Fearing treble-damages liability under the Ninth Circuit's standard, Sawmill *B* may reasonably conclude that the safest course is to bid below what it is willing and able to pay, yielding the very result – artificial depression of input prices – that healthy buy-side competition would prevent.

Allowing antitrust liability to turn on information that is beyond a firm's cognizance will inevitably result in the gross overdeterrence of legitimate competition. That is so regardless of what leads to the asymmetry in firms' tolerance for increasing input prices. The above example posits a relatively simple divergence of strategy and economic condition, but the possible variations on that theme are endless. Whatever the situation, the point is that a healthy, competitive firm cannot be expected to know whether it is bidding against a firm that is "unfairly" suffering from rising input prices (whatever that means) or one that has merely adopted a different (and quite possibly ill-conceived) business strategy.

b. Further compounding the error of premising antitrust liability on information that is not readily observable, the Ninth

Circuit chose a particularly indefinite standard that would, if allowed to persist, prove highly resistant to attempts to dismiss unmeritorious claims short of trial. Almost any unsuccessful firm will be able to adduce some evidence that it was "unfairly" disadvantaged by a competitor's ability to pay more for raw materials or some other aspect of production. Perversely, the least efficient and least successful firms are especially likely to be able to show such evidence of disadvantage, even if the disadvantage largely stems from their own failings. Trial courts will thus find it very difficult to resolve cases on summary judgment, and courts of appeals will be equally limited in their ability to reverse erroneous verdicts. Consequently, defendants will be forced to settle unmeritorious claims or roll the dice at trial, but many will lose that gamble and face ruinous treble-damages liability merely for competing vigorously. Prudent antitrust counsel will surely tell their clients about these risks. See *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983) (Breyer, J.) ("[W]e ask ourselves what advice a lawyer * * * would have to give a client firm considering procompetitive price-cutting tactics in a concentrated industry. Would he not have to point out the risks of suit – whether ultimately successful or not – by an injured competitor * * *?").

Moreover, the courts surely will not lack for plaintiffs. Virtually any market will produce both winners and losers, and the latter will have obvious incentives to bring claims of unfair competition against the former where there exists a substantial likelihood of coercing a settlement. That is particularly true in highly competitive industries, where a weaker firm faces significant pressure (or even immediate extinction) at the hands of its stronger rivals: the more aggressively firms compete, the more likely it is that one will feel the sting of a competitor's advantage and have reason and opportunity to pursue the victor's spoils. The lure of treble damages and attorneys' fees only adds to those warped incentives.

Confronting those realities, any sensible manufacturer will think twice before competing hard to buy scarce inputs; many will rationally conclude that the better choice will be to restrict

their purchases in order to protect less efficient competitors from the full brunt of hard-nosed competition, and to protect themselves from a lawsuit. See U.S. Br. 19-20 (filed May 26, 2006). It is bad enough that the court of appeals' decision would lead to unwarranted treble-damage judgments against defendants who have been zealous in their profitable efforts to compete by being aggressive in their buying behavior. An even more substantial harm would result from the chilling effect on competition that would be invisible to the courts, and uncorrectable by the courts, because that anticompetitive effect will never lead to a lawsuit. See Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 596 (1991); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

c. Alternatively – and, quite perversely – to counter the risk that legitimate competition will lead to treble-damage liability, firms may be tempted to engage in conduct that is truly anticompetitive. In search of certainty regarding whether a given price level is likely to be deemed "fair," firms might logically consider discussing with each other what they expect to bid for a particular input. Such discussions pose obvious risks to competition. See *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) ("[In certain circumstances], the exchange of price information by competitors violates the Sherman Act."); see also *United States Gypsum*, 438 U.S. at 457 ("[T]he exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions."). It would be particularly difficult to avoid that predicament in markets such as the one at issue here, in which inputs often are sold via sealed bidding procedures. See Pet. 4. How else would a successful firm be able to avoid claims that it was paying "too much" for a scarce input? It is passing strange to think that bid rigging – the classic and much more common exemplar of anticompetitive behavior – could be the natural side effect of a rule targeting

"schemes [that] are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589. Yet that is precisely the bizarre possibility the Ninth Circuit's standard creates.

3. The *Brooke Group* standard, by contrast, exhibits none of those weaknesses when applied to buy-side predation claims. It presents juries (and judges, in summary judgment proceedings) with tractable questions: Did the defendant operate at a loss during the alleged predation period? If so, was there a "dangerous probability" that the defendant would be in a position to recoup those losses by suppressing input prices? The first question can be answered by examining the defendant's costs and revenues. If it is necessary to reach the second question, it can be answered by examining market shares, entry barriers, and other factors that can be objectively assessed. Unlike the Ninth Circuit's standard, *Brooke Group* gives judges and juries effective tools for correctly identifying truly predatory buying behavior.

No less important, the *Brooke Group* standard gives firms clear guideposts for steering clear of buy-side predation claims. So long as the firm operates profitably, it can compete vigorously on the price of inputs and in other facets of production without fear of liability. Rather than speculating as to whether a competitor will be "unfairly" prejudiced by a given input price, a firm can generally determine with some reliability how much it can afford to pay for an input and remain profitable. With that information available, firms will be better able to refrain from predatory conduct in the first instance, and effectively to contest predatory buying claims that lack merit. Consequently, firms will not be deterred from engaging in legitimate competition on input prices, nor will they be tempted to transgress other boundaries for the sake of avoiding potential claims of predation. Just as it does in the predatory selling context, the *Brooke Group* standard provides a narrowly tailored and eminently practical means of punishing and deterring predatory buying.

III. The Ninth Circuit's Standard Harms Consumers, As Well As Sellers Of Raw Materials And Manufacturers Of Finished Products

Under the Ninth Circuit's misguided standard, there is only one way for substantial buyers of inputs to reduce the risk of liability for "predatory bidding": they must pull their punches when they participate in the purchasing market, by offering lower prices and purchasing less. That is, of course, precisely the course of conduct that Ross-Simmons says Weyerhaeuser should have followed. And the result of such behavior will be exactly the result that the antitrust laws seek to prevent by outlawing monopsonization: prices for the purchased input will be artificially reduced.

The court of appeals seemingly recognized this risk, but it refused to follow *Brooke Group* because it believed that the "benefit to consumers and stimulation of competition" were less significant in buying markets than in selling markets. Pet. App. 9a. That conclusion grossly underestimates the benefits of competition among buyers, as well as the economic cost of overly broad and amorphous liability standards that deter competition among buyers.

1. When buying competition is artificially suppressed by the threat of misguided antitrust liability, the direct and immediate victims are sellers. If major purchasers choose to offer lower prices and to buy less in order to avoid unfounded charges of predatory behavior, the inevitable result will be lower prices for sellers.

Artificial restraints on competition to buy are condemned by the antitrust laws to the same degree that restraints on competition to sell are condemned:

> The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of

> the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

The reason for that even-handed approach is straightforward. Restraints on market forces lead to inefficiencies that ultimately cause harm to all participants in the market. Artificial restraints on prices – whether those restraints cause prices that are above competitive levels or below competitive levels – are especially pernicious, because "[p]rice is the 'central nervous system of the economy.'" *Prof'l Eng'rs*, 435 U.S. at 692 (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)). Prices convey essential information to producers and consumers and provide incentives for them to act efficiently. High prices are a signal to producers that society will benefit if they expand production. Cf. *Trinko*, 540 U.S. at 407 ("The opportunity to charge monopoly prices * * * induces risk taking that produces innovation and economic growth."). They also tell consumers to look for substitute products that are less costly or to seek efficiencies that will reduce their consumption of the high-priced product.

Free competition among buyers that bids up the price of inputs serves an important purpose. As the court of appeals recognized, "rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." Pet. App. 11a. Unfortunately, the court of appeals dismissed those benefits because of its belief that the supply of alder sawlogs was inelastic – *i.e.*, that supply would not increase rapidly in response to higher prices.

That response is unpersuasive for two reasons.[9] First, as a practical matter, it would be unworkable to apply *Brooke Group* to predatory bidding claims in some markets (where supply is elastic) but not in others (where supply is inelastic). See U.S. Br. 15-16 (filed May 26, 2006). The court of appeals expressed no intent to do so. Second, the court of appeals' reasoning is backwards. If it takes a long time for suppliers to increase supply in response to higher prices (*e.g.*, because newly planted seedlings require many years to mature into harvestable timber), it is all the more important to ensure that misapplication of the antitrust laws does not artificially depress prices. The economic harm that will be caused by such non-competitive pricing will endure for many years, because of the lag between higher prices and an increase in supply.[10]

2. By deterring competition among manufacturers to acquire scarce inputs, the Ninth Circuit's decision also inflicts harm to competition in the production and sale of those manufacturers' finished products. The reason is readily apparent. If a large producer restricts its purchases of raw materials for fear of incurring liability for "predatory bidding," it must also restrict its production of finished goods made from those raw materials. Conversely, a manufacturer that wishes to lower its price and expand its production of finished goods cannot do so

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[9] As we explained above (pp. 11-14, *supra*), the Ninth Circuit's misunderstanding of supply inelasticity also led it to the erroneous conclusion that predatory pricing behavior is more likely to occur in such markets.

[10] The court of appeals also opined that, "at least in this case, predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition." Pet. App. 11a. That statement reflects profound confusion. Truly *predatory* behavior – be it buying ("bidding") or selling ("pricing") – necessarily results in a net loss to consumers and to competition. To label the conduct at issue in this case "predatory bidding" was to assume the conclusion of the very question the court was supposed to be answering. The task before a court is not to decide which categories of predation do and do not benefit consumers, but to determine which categories of conduct should be *labeled* predatory *because* they *do not* benefit consumers and competition on balance.

unless it also increases its purchases of the inputs from which those finished goods are made. See 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 575, at 363-364 (2d ed. 2000) ("The important and often overlooked consequence of monopsony power is *reduced* output on the monopsonist's selling side – that is, because the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less."). The Ninth Circuit's description of this case illustrates the point. During the period of Weyerhaeuser's so-called predatory bidding, the price of finished lumber declined and Weyerhaeuser's share of the market increased. Pet. App. 3a, 23a. Concerns about treble-damage liability under the Ninth Circuit's erroneous holding will discourage manufacturers from doing that which the antitrust laws should encourage: increasing output and lowering prices of the products they sell.

Of course, if the largest manufacturer in a market chooses to restrict its output of finished products and its purchases of inputs in order to reduce the risk of wrongful antitrust liability, its smaller rivals may pick up some of the slack. But that, too, is a result that is inimical to the purposes of the antitrust laws if those smaller rivals are less efficient. In that respect, too, the record in this case illustrates the point. Ross-Simmons suffered losses from 1998 to 2001, a period when the price of sawlogs increased and the price of finished lumber declined. In the same period, Weyerhaeuser continued to operate profitably – a fact that reflects its indisputable ability to manufacture and sell finished lumber more efficiently than Ross-Simmons. Had Weyerhaeuser restricted its purchases of sawlogs, as Ross-Simmons would have liked, the plain effect would have been to reallocate production from more efficient sawmills, such as Weyerhaeuser, to less efficient operators, such as Ross-Simmons.

3. Inevitably, consumers of finished products will also be harmed if competition to acquire scarce inputs is artificially constrained. In the short term, expanded output by the manufacturers of finished products depends on those manufacturers' ability to compete effectively to acquire the raw materials from

which finished products are made. If that competition is not constrained, the increased demand may well place upward pressure on the price of raw materials – particularly where the supply of those inputs is inelastic, see pp. 11-14, *supra*. But consumers nonetheless will benefit from the expanded output of finished products – just as they benefited from the lower prices of alder lumber in this case, even as alder sawlog prices increased.

Over the longer term, the competition that bids up the price of raw materials encourages the producers of those materials to expand their own output, which will place downward pressure on the price of those materials. If price competition among buyers is artificially suppressed because of a plausible fear that competition will lead to antitrust liability, producers' incentives to invest to expand their output will also be suppressed. That is the exact opposite of sound antitrust policy. See note 6, *supra*.

4. The predictable consequences of applying a lax standard to predatory buying claims are not only undesirable, they are also entirely unnecessary. Predatory "schemes are rarely tried, and even more rarely successful,'" *Brooke Group*, 509 U.S. at 226 (quoting *Matsushita*, 475 U.S. at 589), because they are a costly means of exclusion. They require an initial period of sustained losses, sufficient in duration and magnitude to drive rivals from the market. There is considerable risk for the predator that its efforts will not succeed at all, and, if they do, there is still more risk that the payback, through sustained noncompetitive pricing after rivals are gone, will be insufficient to cover the up-front costs. See *Matsushita*, 475 U.S. at 588-589 (discussing risks of predatory pricing strategies); *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 119-120 n.15 (1986) (discussing factors that make successful predation extremely difficult); *id.* at 121 n.17 ("[I]t is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous."). Whether buy-side or sell-side, truly predatory behavior consists, at bottom, of one firm trying to drown its competitors in a sea of the predator's lost profits.

Common sense and experience suggest that firms will readily find better ways to spend their money than by showering it on consumers or suppliers in hopes of indirectly injuring a competitor. See Susan Creighton, D. Bruce Hoffman, Thomas Krattenmaker & Ernest Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977 (2005) ("cheap exclusion" will be relatively more common than "expensive" predation, of which predatory pricing is the "archetypal example").

Legitimate and economically beneficial price competition, by contrast, is a pervasive phenomenon. Just as manufacturers compete with one another in the sale of finished goods, *every* manufacturer must secure the raw materials or other inputs needed to make its products and must compete with other manufacturers that seek the same raw materials or other inputs. In a dynamic economy, the forces of supply and demand for those inputs change frequently and sometimes dramatically. Every manufacturer must respond to those changing market conditions by adjusting the price it pays to secure inputs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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